Office of the Attorney General
State of Texas

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ATTORNEY GENERAL

November 21, 1995

Mr. Richard L. Webb
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OR95-1268

Dear Mr. Webb:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 24067.

The University of Texas System (the "system") solicited proposals for "medical cost management services" for its workers' compensation insurance program. The proposals concern programs to contain costs through, among other things, pre-authorization of medical visits; contracting for services with selected medical care providers; automated processing, reviewing, and screening of medical claims; and making billing adjustments. The system received five separate requests for copies of the submitted proposals. Some of those requests also asked for information about evaluations of the proposals and other information relied upon by the system in selecting the winning proposal.[1]

[1]We note that this office received the system's requests for decision about these various open records requests on January 14 and 28, 1994. The system received the first request for information on November 22, 1993. Section 552.301 requires that a governmental body either release requested information or request a decision from the attorney general within ten days of receiving the request if it is information the governmental body wishes to withhold. If the governmental body fails to request a decision within ten days of receiving the open records request, the information at issue is presumed public.

However, you have supplied information to this office that shows that this requestor agreed to delay the request for records until after a contract was awarded. Since the contract was awarded January 19, 1994, and the system's requests for a decision were received within ten days thereafter, the system timely sought a decision from this office concerning this first request for records.

You contend that the information concerning selection and evaluation of submitted bids is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts interagency and intraagency communications from disclosure only to the extent that they contain advice, opinion, or recommendation for use in the governmental entity's policymaking process. Open Records Decision No. 615 (1993) at 5. We note that an agency's policymaking functions do not encompass routine internal administrative and personnel matters. *Id.* Moreover, to be part of a governmental body's policymaking process, the communications must relate to the policy mission of the governmental body. Open Records Decision No. 631 (1995). The provision of medical cost management services in connection with the system's worker's compensation program is not part of the policy mission of the system. Therefore, the system may not withhold from disclosure the documents in Attachment Nos. 3 through 6 under section 552.111.

You also contend that the information in the proposals and the documents in Attachment No. 6 may be confidential under section 552.110 of the Government Code. Section 552.110 protects the property interests of private persons by excepting from required public disclosure two types of information: (1) trade secrets, and (2) commercial or financial information that is obtained from a person and made privileged or confidential by statute or judicial decision. Open Records Decision No. 592 (1991) at 2. We are aware of no statutory law that would except the commercial or financial information in these proposals from disclosure.[2] *See* Open Records Decision No. 592 (1991). The fact that disclosure of commercial or financial information may cause harm

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[2]One of the companies submitting a proposal, Health Benefit Management, Inc., argues that release of financial information would adversely affect the state's ability to obtain future proposals:

> The state risks losing the participation of small businesses in state purchasing activities if it adopts a policy which permits the unwarranted disclosure of confidential financial information. If potential bidders for state contracts that are closely-held corporations risk revelation of sensitive financial information in any state bid, it will discourage such companies from seeking state business. The same information, when submitted to a private-sector client, is closely guarded and not subject to disclosure.

At one time, this office employed tests developed by the federal courts applying the federal Freedom of Information Act as a basis for excepting commercial or financial information under section 552.110. The principal federal test excepted financial information from disclosure if such disclosure was likely either (1) to impair the government's ability to obtain the information in the future or (2) to cause substantial harm to the competitive position of the person from whom it was obtained. *National Parks & Conservation Ass'n v. Morton,* 498 F.2d 765 (D.C. Cir. 1974). However, in Open Records Decision No. 592 (1991) at 6, this office overruled the line of decisions that had applied the *National Parks* test on the grounds that *National Parks* was not "an expression of the common law of privilege or confidentiality." This office was recently asked to reconsider its decision in Open Records Decision No. 592 (1991). We have declined to reconsider that opinion in Open Records Letter No. 95-1214 (1995). We enclose a copy of Open Records Letter No. 95-1214 (1995) for your information.

to the competitive position of the company supplying the information or that the company may have provided the information to the governmental body under a promise of secrecy is not sufficient to keep the information private.[3] *Id.*

The first part of section 552.110 excepts from disclosure trade secrets or financial information obtained from a person and confidential by statute or judicial decision. The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be:

> any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). A governmental body or a third-party must establish a prima facie case for exception that is not rebutted as a matter of law before this office will find that the trade secret exception applies. Open Records Decision No. 552 (1990).[4]

As provided by section 552.305 of the Government Code, this office gave the companies that submitted proposals to the system the opportunity to submit reasons as to

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[3]We note that information is not excepted from disclosure merely because it is furnished with the expectation that it will be kept confidential. *See, e.g.*, Open Records Decision No. 180 (1977).

[4]The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and other involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." RESTATEMENT OF TORTS, *supra*; *see* also Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

why the proposals should be withheld from disclosure. Responses were received from ten of the thirteen companies that submitted proposals. Three companies, Argus Services Corporation, Comprehensive Rehabilitation Associates, and Health Economics Corporation, did not submit reasons as to why their proposals should be withheld from disclosure. The system argued that the information in these proposals and the other proposals contains trade secrets:

> The information contained in the medical cost management proposals is valuable to the vendors and their competitors . . . . Several of the vendors are Historically Underutilized Businesses . . . who are attempting to survive in a highly competitive market. Disclosure of the proposals could cause these companies to lose their competitive position.

The system stated that "many of the proposals" submitted to the system contain information that is not known outside the vendors' businesses and that "report formats, work flow processes, medical cost management software, client lists, and preferred providers lists" could be taken by competitors if the contents of the proposals are disclosed. The system's arguments, however, do not provide enough information to establish that any proposal contains trade secrets. Therefore, as the system did not make out a prima facie case for withholding the proposals and Argus Services Corporation, Comprehensive Rehabilitation Associates, and Health Economics Corporation did not submit any reasons for withholding their information, these three proposals may not be withheld from disclosure under section 552.110.

We received responses from Anchor Risk Management Services Inc. ("Anchor"), CorVel Corporation ("CorVel"), Crawford & Company ("Crawford"), Gay & Taylor Insurance Adjusters ("Gay & Taylor"), GENEX Services, Inc. ("GENEX"), Health Benefit Management, Inc. ("Health Benefit"), HealthCare COMPARE Corporation ("HealthCare"), International Rehabilitation Associates, d/b/a Intracorp ("Intracorp"), Medical Business Management Services, Inc. ("Medical Management"), and MEDIQ Review Services, Inc. ("MEDIQ"). Each of these companies objected to disclosure of the commercial and financial information contained in the submitted proposals. As discussed above, section 552.110 does not provide an exception for this type of financial and commercial information; therefore, we will consider only the objections based on the trade secrets branch of section 552.110 and the other arguments set out by these companies.

Anchor, CorVel, Crawford, and MEDIQ objected to disclosure of their proposals but failed to make a prima facie case that their proposals contain trade secrets. Health Benefit claimed that certain sections of its proposal were confidential, but later waived its claims except as to its financial information, which is not excepted from disclosure under section 552.110. The CorVel, Crawford, Health Benefit, and MEDIQ proposals must

be released. However, the Anchor proposal contains information that is confidential under federal law. Section 6103(a) of title 26 of the United States Code provides that tax return information is confidential. The federal tax return information must be withheld from disclosure but the other information in the Anchor proposal must be released. We note that the system must withhold tax return information, including taxpayer identification numbers, wherever it appears in the submitted information.

The regional vice president of Gay & Taylor indicates that the information in the proposal is not known to competitors or generally shared with company employees. The proposal contains a list of healthcare providers who are in the company's preferred provider network and resumés of key employees. However, information about health care providers in the Gay & Taylor preferred healthcare network is apparently known to client businesses and agencies, their employees, health care providers, insurers, and others. Trade secret information is "information that is not publicly available or readily ascertainable by independent investigation." *Numed, Inc. v. McNutt*, 724 S.W.2d 432, 434 (Tex. App.--Fort Worth 1987, no writ). Because this information is widely known and easily ascertainable outside of the business, it is not excepted from disclosure as a trade secret. Open Records Decision No. 592 (1991) at 3. Gay & Taylor has also not shown how the resumés of employees constitute trade secrets. However, Gay & Taylor has made a prima facie case that its client list is a trade secret. We have marked the information that must be withheld from disclosure under section 552.110.

GENEX argues that its audited financial statements, reports format, information about a work flow concept, and its preferred provider information are confidential.[5] Section 552.110 will not except the audited financial statements from disclosure because these statements do not meet the definition of a trade secret as is set out in the Restatement. The financial statements are not "formula[e], pattern[s], [or] device[s]." They may be a "compilation of information" but they are not "for continuous use in the operation of the business" but rather are information as to a single or ephemeral event in the conduct of the business -- the financial status of the business at one point in time. Therefore, the audited financial statements are not protected from disclosure under section 552.110 as trade secrets.

GENEX's assistant controller states that the company's reporting format is unique to the industry and unknown to competitors. He also indicates that GENEX "spent four months, and two top managers' time" in developing a concept unknown to GENEX's competitors. GENEX submitted for review GENEX's contract agreements with HealthCare Compare and MedView Services, Inc., the preferred health care network providers. These contracts provide that health care provider rates and medical patient information are confidential. The contracts also state that confidential or non-confidential

[5]The GENEX proposal was submitted under the name of General Care Review. This office has been informed that GENEX was formerly General Care Review.

information obtained under the contract by GENEX shall not be disseminated to third parties. We note that GENEX submitted to the system its health care provider lists as part of its proposal. It appears that the health care provider lists are not confidential under section 552.110 because of the extent to which the information is known by client companies, agencies, their employees, other health care providers, insurers, and others. We have marked the information for which GENEX has made its prima facie case that the information reveals trade secrets. The marked information must be withheld from disclosure.

HealthCare contends that its pricing formulas and examples showing such formulas, certain processes, and client lists are excepted from disclosure. The attorney representing HealthCare asserts that this information is not commonly known by those outside the company. She contends that the pricing formulas are "closely guarded" and that access to information about these processes and client lists is "restricted to those sections of employees who have a need to know in order to perform their duties." All HealthCare employees sign a confidentiality agreement and managers with access to the pricing formula information must sign noncompetition agreements. The attorney states that if the information that it seeks to protect is disclosed, this would enable competitors to gain a competitive advantage by avoiding "start up, developmental and experimental time and costs already borne by [HealthCare]." HealthCare has not, however, demonstrated that two of the items it seeks to withhold, information showing the number of bills processed and the final prices proposed, are trade secrets. We have marked the sections of the proposal that must be withheld from disclosure.

Medical Management asserts that section 552.110 protects certain information in the proposal. We note initially that Medical Management did not specifically identify the sections of the proposal for which it seeks trade secret protection. Medical Management indicated it is seeking section 552.110 protection for "all or part of the documentation submitted in response" to certain sections of the system's request for proposal ("RFP"). However, we are unable to determine with certainty which parts of the proposal were submitted by the company in response to the listed sections of the RFP. Since Medical Management discusses customer lists information about employees, and the "methodologies, forms and techniques" used by Medical Management, we assume that this is the general type of information for which section 552.110 protection is sought. We will consider Medical Management's arguments concerning these types of information.

The attorney representing Medical Management argues that information about key employees and their qualifications should be excepted from disclosure because of the "substantial amount of time and money" the company has spent in training these employees. He states that disclosure of this information would give competitors "a ready made listing of talented individuals for recruiting purposes." The argument that qualified employees might be recruited by competitors is not sufficient to show that employee information constitutes trade secrets. Open Records Decision No. 402 (1983). It

also appears that information about the individuals employed by a company could be readily ascertainable by an independent investigation. *Numed, Inc.* 724 S.W.2d 432; Open Records Decision No. 592 (1991).

The attorney also states that Medical Management has expended time, money, and effort to gain the clients listed in the proposal, that information about these clients is not widely known outside of the company, and that such information would be valuable to competitors. He adds that the company's sample forms, methods, and techniques were developed only through "great expense and extensive experience in the field" and are of substantial value to Medical Management. He indicates that this information is not publicly disclosed and that disclosure would be valuable to competitors. He argues that disclosure of the information would show competitors how to make their operations more efficient and would provide them with forms and materials to use that they would otherwise have to develop on their own. However, most of the forms contained in part 5.2 of the proposal have been seen by third parties. Therefore, they are not secret. Medical Management has made a prima facie case that its client lists, certain purely internal forms, and certain methods and techniques are protected under the trade secret branch of section 552.110. We have marked the information for which Medical Management has made a prima facie case and which must be withheld under section 552.110.

Intracorp asserts that its proposal contains "privileged and confidential material" excepted under section 552.110. Intracorp advised this office that the company would provide citations in support of its objections to disclosure upon request from this office. However, Intracorp was notified by letter by this office that it had the burden of providing all relevant information to support its objection:

> If you wish to claim that any or all of this information is excepted from public disclosure, you must inform us which exceptions apply to it, identifying the specific part or parts of the records that are within the exceptions you raise, and explain why each exception is applicable. A claim that an exception applies without further explanation will not suffice.

Intracorp did not provide enough information to establish a prima facie case that any of the information in its proposal is a trade secret. Open Records Decision No. 402 (1983) (when no relevant information regarding trade secret factors is provided, no basis to conclude trade secret exception applies). Therefore, the system may not withhold the Intracorp proposal under section 552.110.

Both Intracorp and Medical Management assert that the information in their proposals is also excepted from disclosure under section 552.104. Section 552.104 excepts "information that, if released, would give advantage to a competitor or bidder."

The purpose of section 552.104 is to protect a *governmental entity's* interests in relation to competition for a contract or benefit. Open Records Decision No. 592 (1991) at 8. It does not protect the interests of private parties such as Intracorp or Medical Management. *Id.* at 9. Moreover, section 552.104 is generally inapplicable when the governmental entity has awarded the contract. Open Records Decision No. 542 (1990) at 5. The attorney for Medical Management contends that the disclosure of bid information in this situation will damage governmental interests:

> Plainly, the disclosure of bid information disserves the interest of Texas governmental agencies ... in that potential bidders for governmental projects are discouraged from submitting competitive bids given the uncertainty of whether the information submitted in connection with the bids may become freely accessible to their competitors. When fewer bids are submitted in response to a governmental agency's request for proposal, fewer options are available for the government to choose from, therefore decreasing competition, increasing government expenditures and damaging the government's interest in a competitive situation.

Section 552.104 is designed to protect governmental interests, but is applicable only when it is shown that there is the possibility of specific harm in a particular bidding or competitive situation. Open Records Decision Nos. 593 (1991) at 2, 541 (1990) at 4. It is not sufficient to make a "general allegation" or describe the remote possibility that some future, unknown competitor will gain an unfair advantage in future bidding situations. Open Records Decision No. 541 (1990) at 4. Since the system has already awarded the contract and its competitive interests in this particular bidding situation are no longer at issue, section 552.104 is inapplicable in this situation.

Intracorp and Medical Management also both assert that release of certain information in their proposals would be an invasion of privacy. However, the right of privacy protects the feelings of human beings, not businesses. Open Records Decision No. 192 (1978) at 4. Therefore, generally, businesses have no common-law privacy rights. We will, however, consider the information that reveals information about individuals such as employees.

The test to determine if the information at issue in the proposals is private and excepted from disclosure is whether the information is (1) highly intimate or embarrassing to a reasonable person, and (2) of no legitimate public concern. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976) *cert. denied*, 430 U.S. 931 (1977). The Intracorp proposal includes staff profiles, information about employees' responsibilities, employees' professional and educational backgrounds, and an organizational chart. The Medical Management proposal contains resumés and other information about individuals. None of the information at issue in either of these

proposals is highly intimate or embarrassing to a reasonable person. This information therefore is not excepted from disclosure on the basis of common-law privacy and may not be withheld.

You have also asked if copyrighted information in the proposals is excepted from disclosure under section 552.101 as "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Simply because information is copyrighted does not make it confidential under section 552.101. Open Records Decision No. 180 (1977). A governmental body normally must allow inspection of copyrighted materials unless another exception applies to the information. Attorney General Opinion JM-672 (1987). The custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *Id.* In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the following information may not be withheld:

1) Argus Services Corporation's proposal;

2) Comprehensive Rehabilitation Associates' proposal;

3) Health Economics Corporation's proposal;

4) CorVel Corporation's proposal;

5) Crawford & Company's proposal;

6) Health Benefit Management, Inc.'s proposal;

7) Anchor Risk Management Services Inc.'s proposal with the exception of Anchor's tax return information;

8) MEDIQ Review Services, Inc.'s proposal;

9) International Rehabilitation Associates d/b/a Intracorp's proposal; and

10) Attachment Nos. 3 through 6.

With regard to the following proposals, only the marked portions must be withheld; the remainder of the information in these proposals may not be withheld:

1) Gay & Taylor Insurance Adjusters' proposal;

2) GENEX Services, Inc.'s proposal;

3) HealthCare COMPARE Corporation's proposal; and

4) Medical Business Management Services, Inc.'s proposal.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

Stacy E. Sallee

Stacy E. Sallee
Assistant Attorney General
Open Records Division

SES/rho

Ref.: ID# 24067

Enclosures: Open Records Letter No. 95-1214 (1995)
Marked and submitted documents

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